In The

Supreme Court of the United States

October Term 1960

No. 151

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Involved	3
Constitutional Provisions Involved	4
Statement of the Case	5
Reasons for Granting the Writ	6
Conclusion	10
Appendix	1a
Opinion of Wisconsin Supreme Court	1a

CITATIONS

Cowgill v. Boock, 189 Ore. 282, 218 P. 2d. 445, 19 ALR 2d. 405 (1950)	8
Dunlap v. Dunlap, 84 N. H. 352, 150 A. 905 (1930)	8
Emery v. Emery, 45 Cal. App. 2d. 421, 289 P. 2d. 218 (1955)	8
Hewlett v. George, 68 Miss. 709, 9 So. 885 (1891)	7
McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664 (1903)	7

PAGE

Nudd v. Matsoukas, 7 Ill. App. 2d. 608, 131 N. E. 2d. 525 (1956) 8

Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905) 7

Schwenkhoff v. Farmers Mutual Automobile Insurance Company, 6 Wis. 2d. 44, 93 N. W. 2d. 867 (1959) 5, 5a

Schwenkhoff v. Farmers Mutual Automobile Insurance Company, 11 Wis. 2d. 97, 104 N. W. 2d. 154 (1960) 6

Sullivan v. Christienson, 191 N. Y. S. 2d. 625 (1959) 8

Wells v. Wells, 48 S. W. 2d. 109 (1932) (Mo. App.) 8

Wick v. Wick, 192 Wis. 260, 263, 212 N. W. 787 (1927) 6, 7, 5a, 7a

Young v. Rankin (Scot.) (1934) Sc. 499, see digest of case in Eng. & Emp. Dig. Cum. Sup. 1941, Infants, page 150 8

CONSTITUTION OF THE UNITED STATES

Art. *V*, Amendments 3, 4, 6, 4a

Art. *XIV*, Sec. 1, Amendments 3, 4, 6, 9, 4a

CONSTITUTION OF THE STATE OF WISCONSIN

Art. *I*, Sec. 9, Wisconsin Constitution 3, 4, 6, 4a

Art. *XIV*, Sec. 13, Wisconsin Constitution 3, 4, 7, 8, 4a

STATUTES

PAGE

28 U. S. C. A. § 1257 (3) 2

LAW REVIEW ARTICLES

41 Marquette Law Review 188-199 (Fall 1957) 9

33 St. John's Law Review 310-320 (May, 1959) 9

In The

Supreme Court of the United States

October Term, 1960

No.....

LONETTE SCHWENKHOFF, by
Guardian ad Litem, Vaughn S. Conway,
Petitioner,

vs.

FARMERS MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petitioner prays that a writ of certiorari issue to review a judgment of the Supreme Court of the State of Wisconsin, which affirmed the judgment of the County Court of Sauk County, Wisconsin, dismissing the complaint of the petitioner by her guardian ad litem, against the respondent.

OPINIONS BELOW

The proceedings have been before the Supreme Court of Wisconsin on two occasions. The first decision is reported at 6 Wis. 2d. 44, 93 N. W. 2d. 867 (1959), and the second decision, which is the basis of this petition, is reported at 11 Wis. 2d. 97, 104 N. W. 2d. 154 (1960). The latter opinion is appended hereto. (pp. 5a to 9a), and the former opinion is set forth in the original record. (pp. 120-125).

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin was rendered on June 28, 1960.

Jurisdiction of this Court is conferred by 28 U. S. C. 1257(3).

QUESTIONS INVOLVED

1. Has the unemancipated minor petitioner been deprived of property without due process of law, in violation of Art. *V*, and Art. *XIV*, Sec. 1, of the Amendments to the United States Constitution, by being denied the right to maintain an action for damages for personal injuries against the liability insurance carrier of her father?

2. Has the unemancipated minor petitioner been additionally deprived of property without due process of law, in violation of Art. *XIV*, Sec. 1, of the Amendments to the United States Constitution, by reason of the Supreme Court of Wisconsin failing to properly apply Art. *I*, Sec. 9, and Art. *XIV*, Sec. 13, of the Wisconsin Constitution, to the facts presented herein?

3. Has the unemancipated minor petitioner been denied the equal protection of the laws, in violation of Art. *XIV*, Sec. 1, of the Amendments to the United States Constitution, by being denied the right to maintain an action for damages for personal injuries against the liability insurance carrier of her father.

CONSTITUTIONAL PROVISIONS INVOLVED

1. *Art. V, of Amendments to the United States Constitution:* "No person shall be . . . deprived of life, liberty or property without due process of law."

2. *Art XIV, Sec. 1, of Amendments to the United States Constitution:* ". . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. *Art. I, Sec. 9, Wisconsin Constitution:* "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformable to the laws."

4. *Art. XIV, Sec. 13, Wisconsin Constitution:* "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with the Constitution, shall be and continue part of the law of this state until altered or suspended by the Legislature."

STATEMENT OF THE CASE

On February 2, 1956, petitioner, an unemancipated minor, was a passenger in her father's automobile, insured by the respondent, when a collision took place with a truck owned by Sauk County, a Wisconsin municipality, on a county trunk highway in Sauk County, Wisconsin. The father was not made a party defendant to the proceedings by reason of Wisconsin's direct action statutes permitting actions for damages arising from automobile accidents to be instituted directly against the liability insurance carriers.

The original complaint alleged that the collision occurred by reason of the combined negligence of both drivers involved. The defendants therein filed a demurrer to the complaint, which was sustained by the Wisconsin Supreme Court in *Schwenkhoff v. Farmers Mutual Automobile Insurance Company*, 6 Wis. 44, 93 N. W. 2d. 867 (1959). Leave was granted to the petitioner to plead over.

An amended complaint was served thereafter which set up an additional cause of action alleging that the petitioner was being deprived of her constitutional rights as guaranteed under both the Wisconsin and the United States Constitutions by reason of the Wisconsin Supreme Court denying the existence of a cause of action in favor of the petitioner against her father's liability insurance carrier, and sought relief authorizing her to maintain such proceedings. The federal questions sought to be reviewed herein were raised specifically in the trial court by the allegations contained in the second cause of action of the amended complaint, and were further raised as specific issue on the second appeal to the Wisconsin Supreme Court (11 Wis. 2d. 97, 104 N. W. 2d. 154 (1960). The Wisconsin

Supreme Court in *Schwenkhoff v. Farmers Mutual Automobile Insurance Company*, 11 Wis. 2d. 97, 104 N. W. 2d. 154 (1960) affirmed the judgment of the trial court dismissing the unemancipated minor's cause of action against the respondent.

REASONS FOR GRANTING THE WRIT

It is submitted that the right of an individual, be he a minor or an adult, to recover damages for personal injuries sustained by him caused by the negligence of another, is a property right, and a denial of this legitimate right to recover such damages should be held to be the deprivation of property without due process of law as guaranteed under the provisions of Art. *V*, and Art. *XIV*, Sec. 1, of the Amendments to the United States Constitution.

The provisions of Art. *I*, Sec. 9, Wisconsin Constitution, set forth a guarantee that every individual will be entitled to a "remedy for every wrong." Particular emphasis was placed upon this proposition by Justice Crownhart in his dissenting opinion in *Wick v. Wick*, 192 Wis. 260, 263, 212 N. W. 787 (1927), where he stated that this provision declared a public policy of the state which the courts should not be at liberty to disregard. He further pointed out at page 268 of the opinion that although the courts which had denied an infant a right to sue a parent in tort have grounded their decisions on public policy, such decisions should not be binding on a Wisconsin Court since the other jurisdictions do not have constitutional provisions similar to those of Wisconsin.

The Wisconsin Supreme Court has predicated its most current ruling in 11 Wis. 2d. 97, 101, upon a contention that since the state legislature has not seen fit through the years to enact a bill which would give an unemancipated minor the right to maintain such litigation, an expression of public policy has therefore been made by the legislature for the Court to follow to the effect that no change should be made in the rule. In view of the provisions of Art. *XIV*, Sec. 13, of the Wisconsin Constitution holding that "such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with the Constitution, shall be and continue part of the law of this state until altered or suspended by the Legislature," it is submitted that the effect of the ruling of the Wisconsin Supreme Court is to deprive the petitioner of property without due process of law in violation of the Amendments of the United States Constitution, since the Wisconsin Constitution can only be interpreted to mean that until the state legislature clearly outlaws such a cause of action, such litigation should be permitted. A study of all of the decisions on the subject involved, both in Wisconsin, and all other jurisdictions, clearly discloses the fact that the earliest decision reported anywhere was *Hewlett v. George*, (1891) 68 Miss. 709, 9 So. 885, and followed thereafter by *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S. W. 664 (1903), and *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905), all of which denied recovery to the minor on the theory that it would be contrary to public policy and holding further that "at common law such an action could not be maintained." Nevertheless, the Wisconsin Supreme Court in the *Wick* case at page 261, clearly stated and indicated that it was satisfied that English decisions afforded no precedent

and conceded that there were no cases involving the subject herein which had come on for hearings before any appellate court in England or United States prior to 1891. It is a matter of common knowledge that Wisconsin became a State admitted to the Union many years prior to 1891. Therefore, the failure of the Wisconsin courts to properly consider and apply Art. *XIV*, Sec. 13, of the Wisconsin Constitution to the facts herein should be deemed to be a deprivation of property without due process of law, as guaranteed under the United States Constitution.

A trend of reversals of this doctrine has started to develop in other jurisdictions, but all have been predicated upon the courts reversing established public policy where no constitutional provisions similar to those of Wisconsin existed. See, *Dunlap v. Dunlap*, 84 N. H. 352, 150 A. 905 (1930); *Wells v. Wells*, (1932) (Mo. App.) 48 S. W. 2d. 109; *Young v. Rankin* (Scot.) (1934) Sc. 499, see digest of case in *Eng. & Emp. Dig. Cum. Sup. 1941, Infants*, page 150; *Cowgill v. Boock*, 189 Or. 282, 218 P. 2d. 445, 19 ALR 2d. 923 (1951); *Emery v. Emery*, 45 Cal. App. 2d. 421, 289 P. 2d. 218 (1955); *Nudd v. Matsoukas*, 7 Ill. App. 2d. 608, 131 N. E. 2d. 525 (1956); and *Sullivan v. Christienson*, 191 N. Y. S. 2d. 625 (1959).

It is further significant to note that despite the presentation of these Constitutional issues herein on two separate occasions, the Wisconsin Supreme Court has still not squarely considered and disposed of these issues, except for the remarks alluding to them contained in the concurring opinion of Justice Currie at 11 Wis. 2d. 97, 103.

It is contended that any attempt to continue the slavish following of the old antiquated rulings discussed previously

under the guise of following the established rule of the common law would amount, and be tantamount, to a denial of due process of law under the Federal Constitution to the injured minor petitioner.

It is pointed out in 41 Marquette Law Review, 188-199 (Fall, 1957) that it is difficult to reconcile the fact that the property rights of a minor are more zealously protected in law than are the rights of the person of minor, and yet if the current decision is permitted to stand, this is the inevitable consequence resulting. It is further stated in 33 St. John's Law Review, 310-320 (May, 1959) that at common law the minor was regarded as a separate legal entity fully responsible for his wrongs and entitled to the enjoyment of his own property. It would then be illogical to take this well established concept and throw it to the winds when it comes to the consideration of the rights of damages to the person of the minor.

Article *XIV*, Sec. 1, of the Amendments to the United States Constitution further provides that no one should be denied the equal protection of the laws. The adult injured person, as well as the emancipated minor, has a right to maintain the action in question in Wisconsin for recovery of damages for the personal injuries, but the decision of the Wisconsin Supreme Court denies this same right to the unemancipated minor. This class distinction, without any legal basis or foundation, constitutes a denial of the equal protection of the laws clause in the 14th Amendment of the U. S. Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted to review the judgment of the Supreme Court of the State of Wisconsin.

Respectfully submitted,

VAUGHN S. CONWAY and
KENNETH H. CONWAY
Conway Building
Ash at Tenth
Baraboo, Wisconsin

IRVING D. GAINES
212 West Wisconsin Avenue
Milwaukee 3, Wisconsin

Attorneys for Petitioner

APPENDIX

STATE OF WISCONSIN
IN SUPREME COURT

No. 315 August Term, 1959

VADA SCHWENKHOFF and
LONETTE SCHWENKHOFF,
by Guardian ad Litem, Vaughn S. Conway,
Plaintiffs-Appellants,

vs.

FARMERS MUTUAL AUTOMOBILE INSURANCE
COMPANY and SAUK COUNTY,
a Wisconsin Municipality,
Defendants-Respondents.

June 28, 1960

APPEAL from a judgment of the county court of Sauk County: ROBERT H. GOLLMAR, Judge. Affirmed in part; reversed in part.

Action to recover damages for personal injuries received in a collision of motor vehicles. One of the vehicles was a Chevrolet automobile driven by Orville Schwenkhoff, and the other was a truck with snowplow attached belonging to Sauk County and driven by one George Yonke. The plaintiff, Vada Schwenkhoff, is the wife of Orville Schwenkhoff, and the plaintiff Lonette Schwenkhoff is his infant daughter. The plaintiffs were guest passengers in the Schwenkhoff automobile. The above-entitled matter was

originally started by service of summons and complaint to which each of the defendants interposed a demurrer. The trial court in that case sustained the demurrer and appeal was taken to the supreme court. This court sustained the trial court's decision dismissing the complaint of the minor daughter with leave to the plaintiff to plead over.

The plaintiffs in their amended complaint set forth two separate causes of action. The first cause of action is that of Vada Schwenkhoff, the wife of Orville Schwenkhoff, and Lonette Schwenkhoff, his infant daughter, by her guardian ad litem. The second cause of action sets forth that Lonette Schwenkhoff is the infant daughter of Orville Schwenkhoff and realleges, reaffirms and incorporates the allegations of the first cause of action and then sets forth sec. 9, art. I, sec. 13, art. XIV of the Wisconsin Constitution, art. V of the amendments to the United States Constitution, and then sets forth that by virtue of the court rulings referred to in the complaint, the minor plaintiff has been and continues to be deprived of all her rights under the Wisconsin and United States Constitutions.

The defendants filed identical demurrers to the second cause of action on the ground that it does not state facts sufficient to constitute a cause of action against the defendant Sauk County, and demurred on the further ground that several causes of action had been improperly united. The trial court sustained the demurrers of the defendants, and on October 28, 1959, entered the following order granting the plaintiff the following three alternatives:

"(a) The action may be dismissed as to the plaintiff Lonette Schwenkhoff, and the first cause of action then

stand as the pleading in the matter, subject to answer or demurrer as the defendants may elect.

"(b) In addition to (a) set forth above, the plaintiff Lonette Schwenkhoff may submit a proposed amended complaint against the defendant Sauk County alone, and in the event that this alternative is followed, the two actions will then be split and set up as separate lawsuits which will result in an action of Vada Schwenkhoff against Farmers Mutual Automobile Insurance Company and Sauk County; and an action of Lonette Schwenkhoff, by guardian ad litem, against Sauk County.

"(c) If plaintiff does not follow either of the foregoing alternatives within thirty days from the date of this order, defendant shall have the right to move for judgment, and an order will be entered dismissing the action with costs to the defendants."

The order allowed the plaintiff or plaintiffs thirty days within which to file their amended pleadings. The order further provided that if the plaintiffs did not exercise the options extended to them by the court within thirty days, the defendant would have the right to move for dismissing the action with costs.

Forty-four days elapsed after the entry of the order of October 28, 1959, and the plaintiffs not having filed any amended pleadings in the action, the defendants moved for judgment dismissing the action returnable on December 11, 1959. The trial court granted the motion for judgment and judgment was entered on December 11, 1959, dismissing the complaint of the plaintiffs as to both causes of action with costs in the amount of $100.00 to be paid to each of the defendants by the plaintiffs.

It is from this judgment that the plaintiffs appeal.

The constitutional provisions involved in the second cause of action are as follows:

Sec. 9, art. I of the Wisconsin Constitution provides as follows:

> "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

Sec. 13, art. XIV of the Wisconsin Constitution provides as follows:

> "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

Art. V of the amendments to the United States Constitution provides as follows:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

Sec. 1, art. XIV of the amendments to the United States Constitution provides as follows:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

For the appellants there were briefs by Vaughn S. Conway and Kenneth H. Conway, both of Baraboo, attorneys, and Irving D. Gaines of Milwaukee of counsel, and oral argument by Vaughn S. Conway.

For the respondents there was a brief by Langer & Cross of Baraboo, and James R. Seering, district attorney of Sauk County, and oral argument by Mr. Clyde C. Cross, Mr. H. M. Langer and Mr. Seering.

Opinion by Justice Dieterich: This action comes before us a second time. SCHWENKHOFF v. FARMERS MUT. AUTOMOBILE INS. CO. (1959), 6 Wis. (2d) 44, 93 N. W. (2d) 867. In that case Mr. Justice Broadfoot stated:

(p. 45) "In *Wick v. Wick* (1927), 192 Wis. 260, 212 N. W. 787, this court determined that an unemancipated minor cannot maintain an action in tort against its parent for personal injury sustained in an automobile accident due to the negligence of the parent. That rule has been consistently followed in this state since that time."

(p. 46) "A careful reading of the decisions in the cases cited above will show that there has been no relaxation or modification of the rule pronounced in the *Wick* Case. In some of the decisions attention is called to the fact that the *Wick* decision was based upon public policy; that matters of public policy are to be resolved by the legislature, and the attention of the legislature was directed to the matter in those decisions. The legislature as late as 1957 failed to enact a bill designed to change the rule."

The 1958-1959 legislature has likewise failed to enact a bill designed to change the rule. This constitutes an

expression by the legislature that no change should be made in the rule.

The so-called new allegations contained in the amended complaint recite constitutional provisions which the minor child claims gives her a right to maintain a cause of action against her father's automobile insurance company as well as Sauk County. These issues were considered by this court in its decision of January 2, 1959, when it affirmed the order of the trial court dismissing the complaint as to the minor, Lonette Schwenkhoff, with leave to plead over.

The trial court in its order and judgment dismissed both plaintiffs' causes of action against the defendants, Farmers Mutual Automobile Insurance Company and Sauk County.

The plaintiff, Vada Schwenkhoff, has an action against the Farmers Mutual Automobile Insurance Company and Sauk County, and Lonette Schwenkhoff, the minor, has an action against Sauk county. It is our opinion that justice to the parties plaintiff requires the exercise of our discretionary power to reverse that part of the judgment dismissing the complaint of Vada Schwenkhoff against the defendants Farmers Mutual Automobile Insurance Company and Sauk County, a municipality, and the action of Lonette Schwenkhoff, by her guardian ad litem Vaughn S. Conway, against Sauk County, a Wisconsin municipality, defendant, and reinstate the three alternatives contained in the trial court's order dated October 28, 1959, plaintiffs to exercise such option within thirty days from the date of the remittitur.

By the Court—The judgment in so far as it dismisses the complaint of Lonette Schwenkhoff, by her guardian ad litem, against the Farmers Mutual Automobile Insurance Company is affirmed. In all other respects the judgment is reversed, and the trial court is directed to reinstate the three alternatives of its order dated October 28, 1959, plaintiffs to exercise such option within thirty days from the date of the remittur.

HALLOWS, J., took no part.

CURRIE, J. (concurring). The appellants' brief points out that, while our opinion in the first appeal stated that the contention had been raised that sec. 9, art. I, Wisconsin Constitution, which provides that every person is entitled to a certain remedy in the laws for all injuries or wrongs that he may receive in his person, governed the plaintiff minor's right to recover, nevertheless such opinion failed to pass on such issue. Again, although the same contention is vigorously advanced on this second appeal, the opinion of the court fails to advance any reason why such contention is not a meritorious one.

The opinion on the first appeal, after making note of the contentions advanced, stated (6 Wis. (2d) 44, 46, 93 N. W. (2d) 867):

> "The subject has received the attention of this court in later cases, among which are *Zutter v. O'Connell*, 200 Wis. 601, 229 N. W. 74; *Segall v. Ohio Casualty Co.*, 224 Wis. 379, 272 N. W. 665; and *Lasecki v. Kabara*, 235 Wis. 645, 294 N. W. 33."

None of the three above-cited cases makes any mention of sec. 9, art. I, Const. However, Mr. Justice CROWNHART grounded his dissent in *Wick v. Wick* (1927), 192 Wis. 260,

263, 212 N. W. 787, upon this constitutional provision, but the majority opinion makes no mention of the same. The only reason that comes to mind for such omission in the majority opinion is that the dissent may have been filed after the majority opinion had already been handed down.

While the majority of this court apparently has never directly stated why sec. 9, art. I, Const., does not confer a cause of action upon a minor child to recover for injuries caused by the tort of a parent, there are a number of past decisions of this court which do deal with this constitutional provision, and lay down the principle which governs the instant appeal.

In the recent case of *Firemen's Insurance Co. v. Washburn County* (1957), 2 Wis. (2d) 214, 85 N. W. (2d) 840, the argument was advanced that this same constitutional provision abolished the common-law immunity of all governmental units from liability for negligence. After citing and considering the earlier Wisconsin cases bearing on the application of sec. 9, art. I, Const., we concluded that such provision must be construed in the light of the common law as it stood at the time of the adoption of the constitution in 1848. It was held that the framers of the constitution in drafting sec. 9, art. I, had no thought in mind of thereby abolishing an immunity from suit that then existed. While in *Firemen's Ins. Co. v. Washburn County, supra*, we were dealing with the tort immunity of governmental units, the same reasoning is equally applicable to the immunity from suit for negligence of a parent for injuries caused his child. See also *McCoy v. Kenosha County* (1928), 195 Wis. 273, 218 N. W. 348, 57 A. L. R. 412.

We note that the legislature at its 1959 session refused to enact a statute abolishing the immunity of a parent to respond in damages to a child injured through the wrongful act of the parent. Bill 250, A., was introduced in the assembly, and Bill 89, S., was introduced in the senate, to accomplish such result. Each was accorded the fate of indefinite postponement by the house in which it originated. This further definite expression of legislative action is controlling upon this court in a policy matter of this kind. As we pointed out in *Scholberg v. Itnyre* (1953), 264 Wis. 211, 58 N. W. (2d) 698, the creation of new causes of action in behalf of children presents a question of policy which properly lies within the province of the legislature and not this court.

I am authorized to state that Mr. Justice BROWN joins in this concurring opinion.